

APPEALS: AN OVERVIEW - (John Carr-Hartley, Managing Partner)

When a party is aggrieved by a decision of the High Court, their remedy is to note an appeal to the Court of Appeal. The Court of Appeal is the highest Court of the land, and no further appeal lies from the decision of the Court of Appeal.

Not every decision which aggrieves a party can, however, be appealed.

In order for a decision to be appealable, the decision must be a final judgment or order of the Court. In general, interlocutory decisions of a Court are not appealable unless they are final in effect. For example, a Ruling which refuses an Application for Summary Judgment is not appealable as of right because it is not final in its effect by reason of the fact that the matter then continues to trial. However, where Summary Judgment is granted against a Defendant, the Defendant can appeal as of right because the Judgment is final in its effect.

In the event that a party is so aggrieved by an interlocutory ruling, the aggrieved party may apply to the Judge for leave to appeal against the ruling and, if leave to appeal is granted, the party may then note an appeal.

Where an appeal lies as of right (against a final judgment or order), an appeal is noted by serving and filing a Notice and Grounds of Appeal. The Notice and Grounds of Appeal must be served on the other party(s) and filed at Court within six weeks of the handing down of the Judgment or Order complained of. The Notice must set out the parts of the Judgment or Order with which the aggrieved party is dissatisfied and also the grounds of appeal being the grounds upon which the aggrieved party contends the Judgment or Order is wrong and ought to be set aside. Generally, only grounds of appeal contained in the Notice will be considered by the Court of Appeal.

In addition, as a general rule, only documents and evidence which were placed before the lower Court will be considered by the Court of Appeal when it decides the Appeal.

In Botswana, unlike in some other jurisdictions, the noting of an appeal does not stay or suspend the operation of the Judgment or Order being appealed against.

As a result, the party in whose favour the Judgment or Order has been granted is entitled to the benefit of the Judgment unless the Court, in an Application for Stay of the Judgment orders otherwise.

Irrespective of whether an appeal lies as of right or leave to appeal is granted, the Appellant is required to pay security for costs. After the appeal has been noted, the parties are summoned to appear before the Registrar of the Court of Appeal who then determines an amount of security for costs to be deposited with the Court of Appeal and against which the Respondent (if successful) can recover its costs in respect of the appeal. The rationale behind security for costs is to prevent frivolous appeals being noted.

The decision to appeal a Judgment or Order, no matter how aggrieved a party may feel, should never be taken lightly and it is often advisable to have a fresh pair of eyes review the Judgment before taking the decision to appeal.